Supreme Court, U.S.
FILED
MAY 12 2003
OFFICE OF THE CLERK

(3)

No. 02-1191

In the Supreme Court of the United States

CARLO DONATO,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

WILLIAM H. J. HUBBARD
Mayer, Brown, Rowe & Maw
190 S. LaSalle St.
Chicago, IL 60603
(312) 782-0600

ANDREW H. SCHAPIRO
Counsel of Record
Mayer, Brown, Rowe & Maw
1675 Broadway
New York, NY 10019
(212) 506-2500

Counsel for Petitioner

TABLE OF AUTHORITIES

Page(s)

CASES

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 4

Clay v. *United States*, 123 S. Ct. 1072 (2003) 2, 3

Duncan v. *Walker*, 533 U.S. 167 (2001) 3

Edelman v. *Lynchburg College*, 535 U.S. 106 (2002) 3

Guinan v. *United States*, 6 F.3d 468 (7th Cir. 1993) 2

Massaro v. *United States*, __ U.S. __, 2003 WL 1916677 (April 23, 2003) 2

Ortega-Rodriguez v. *United States*, 507 U.S. 234 (1993) 2

Thomas v. *Arn*, 474 U.S. 140 (1985) 2

TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 3

United States v. *Addonizio*, 442 U.S. 178 (1979) 4

United States v. *Campbell*, 168 F.3d 263 (6th Cir. 1999) 5

United States v. *Hass*, 199 F.3d 749 (5th Cir. 1999), *cert. denied*, 531 U.S. 812 (2000) 7

United States v. *Harris*, 159 F.3d 1357 (5th Cir. 1998) (table), *cert. denied*, 525 U.S. 1148 (1999) 7

United States v. *Marmolejo*, 139 F.3d 528 (5th Cir. 1998), *cert. denied*, 525 U.S. 1056 (1998) 7

United States v. *McCoy*, 313 F.3d 561 (D.C. Cir. 2002) (en banc) 3, 4, 7

United States v. *Moore*, 83 F.3d 1231 (10th Cir. 1996) 3, 5

TABLE OF AUTHORITIES – continued

Page(s)

United States v. *Rudolph*, 190 F.3d 720 (6th Cir. 1999) 5

United States v. *Saikaly*, 207 F.3d 363 (6th Cir. 2000) 5

United States v. *Whren*, 111 F.3d 956 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1119 (1998) 7

STATUTES, RULES, AND GUIDELINE

18 U.S.C. § 3551(a) 6

18 U.S.C. § 3553 6

18 U.S.C. § 3742 ..... 1, 5, 6

28 U.S.C. § 2106 6

28 U.S.C. § 2255 ..... 1, 4, 5

Fed. R. Crim. P. 32 ..... 3, 7

Fed. R. Crim. P. 32.1(b) 5

U.S.S.G. § 2K2.4 4

REPLY BRIEF FOR THE PETITIONER

There is a deep and persistent circuit split on the question presented. The government acknowledges that. The question presented is important and recurring. The government does not contest that. Nevertheless, the government asks this Court to deny the petition on four grounds: (1) that uniformity as to the issue presented might not be necessary; (2) that petitioner's sentence would not be affected by a favorable ruling on the merits; (3) that the fact that the case arises under 28 U.S.C. § 2255 somehow renders it a poor vehicle; and (4) that the lower courts should have the opportunity to consider whether recent revisions to 18 U.S.C. § 3742 have a bearing on the question presented. None of these arguments has any merit.[1]

1. The government concedes the existence of the deep circuit split on the question presented. See U.S. Br. 8-9 & nn.2-3. The government suggests, however, that "[i]t is not clear that there is any need for this Court to adopt a uniform rule for all the courts of appeals, because the rules concerning resentencing on remand might appropriately be viewed as

---

[1] The government also inaccurately reformulates the question presented. The government's question presented suggests (at I) that the Second Circuit had "remand[ed] for correction of a specific sentencing error." If that were the case, then there would be no question that the remand was limited and de novo resentencing would have been improper. But the Second Circuit was clear that the remand was not "specific" in limiting the scope of resentencing. See App. 10a ("Th[e] remand order neither explicitly stated that the sole issue on remand was whether 'double counting' affected Donato's sentence on the conspiracy count, nor indicated that we intended a *de novo* resentencing"). Thus, this petition clearly presents the question whether resentencing should be de novo when the remanding court does not specify limits on the scope of resentencing. See Pet. i.

local rules that can differ from circuit to circuit." *Id.* at 9. That assertion, unfortunately, has recently become a common refrain from the government in cases, such as this one, that involve circuit splits over procedure clearly warranting review by this Court. In *Massaro* v. *United States*, __ U.S. __, 2003 WL 1916677 (April 23, 2003), for example—citing the same two cases relied upon in its brief in this case—the government argued that certiorari was not warranted because the "choice of which procedural rule to adopt is not an issue requiring a uniform national solution." Br. in Opp. 12 in *Massaro*, No. 01-1559 (citing *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993), and *Thomas* v. *Arn*, 474 U.S. 140, 146 (1985)). This Court evidently disagreed. So, too, in *Clay* v. *United States*, 123 S. Ct. 1072 (2003), the government asserted at the petition stage that, despite the clear circuit split, a disagreement concerning when a conviction becomes final for filing-period purposes was but a "narrow procedural disagreement [that] does not merit this Court's intervention." Br. in Opp. 7 in *Clay*, No. 01-1500. Again this Court rejected the government's argument.

As explained in the petition, a circuit split on an important and recurring procedural question such as that presented here is a matter well worthy of this Court's attention. See Pet. 8-13. This is especially the case when, as here, the issue can be outcome-determinative for litigants, and is one as to which, realistically, uniformity will not be had without Supreme Court review.

Massaro is a prime recent example of this Court's recognition of the importance of resolving circuit splits over matters of court-made procedure, to protect the values of efficiency and accuracy in judicial decision-making. In that case this Court emphasized that "[r]ules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time," *Massaro*, 2003 WL 1916677, at *3 (quoting *Guinan* v. *United States*, 6 F.3d 468, 474 (7th Cir. 1993) (Easterbrook, J., concurring)), and went

on to weigh the "inefficiencies" generated by a rule that applied procedural default to ineffective assistance claims. *Id.* at *5. Such concerns are equally present here. For other examples of recent cases granted to resolve so-called procedural disagreements among the circuits, see *Clay* v. *United States*, 123 S. Ct. 1072 (2003) (discussed *supra*); *Edelman* v. *Lynchburg College*, 535 U.S. 106 (2002) (upholding EEOC rule permitting verification of an otherwise timely complaint after the time for filing had expired, resolving circuit split); *TRW Inc.* v. *Andrews*, 534 U.S. 19 (2001) (holding that the FCRA statute of limitations does not incorporate a "discovery" rule, resolving circuit split); and *Duncan* v. *Walker*, 533 U.S. 167 (2001) (holding that AEDPA's statute of limitations is not tolled while a prior federal habeas petition is pending, resolving circuit split).

In any event, the disagreement at the heart of this circuit split cannot properly be viewed as a simple divergence of local rules. As the government acknowledges in a footnote, at least two circuits have based their conclusions about the proper rule on their interpretations of Fed. R. Crim. P. 32.[2] The government correctly notes (at 9-10 n.4) that if the courts of appeals are finding such a connection, then the issue in this case is not properly considered one of local procedure. In fact, because some courts of appeals have treated the issue as one that is governed by Rule 32, there is a split not only as to the correct rule, but also as to whether the Federal Rules of Criminal Procedure inform or control the determination of the correct rule.

The question presented is an important issue that affects scores of cases every year. If by nothing else, the significance of this question is confirmed by the extensive discus-

---

[2] See *United States* v. *McCoy*, 313 F.3d 561, 564-565 (D.C. Cir. 2002) (en banc); *United States* v. *Moore*, 83 F.3d 1231, 1235 (10th Cir. 1996).

sion of the question by virtually all of the courts of appeals over the last ten years, including the D.C. Circuit's recent en banc treatment of the issue. See *United States* v. *McCoy*, 313 F.3d 561 (D.C. Cir. 2002) (en banc).

2. The government asserts (at 10) that the petition should be denied because "petitioner would not be entitled to relief even under the rule he proposes." That is simply wrong. Only petitioner's *Apprendi* and downward departure arguments were disposed of on the merits. The government ignores the other claims (clearly set in out the petition (at 5) and the opinion below) rejected by the Second Circuit solely on "law of the case" grounds: arguments that the district court failed to consider required factors in the calculation of restitution and the fine (App. 19a-20a); arguments based on the Eighth Amendment (App. 20a); and the argument that the district court should not have enhanced the sentence for "special offense characteristics" under U.S.S.G. § 2K2.4 (App. 20a). Success on any of these issues would have a material effect on petitioner's sentence.[3]

3. The government's argument that the appropriateness of this case for certiorari is affected by the fact that it arises from a 2255 motion is a red herring. The government points to the "'narrow limits' on the 'grounds for collateral attack on final judgments' under Section 2255." U.S. Br. 11 (quoting *United States* v. *Addonizio*, 442 U.S. 178, 184-185 (1979)). This argument should not concern the Court for two reasons.

First, although many resentencings, predictably, follow direct appeals rather than appeals regarding 2255 motions, the courts of appeals apply the same rules defining the scope of remand to all remands for resentencing. As the petition

---

[3] At 115 years, petitioner's term of imprisonment exceeds his mandatory minimum sentence by ten years; the restitution and fines imposed exceed $470,000. See App. 8a.

itself clearly pointed out (at 8-9 & n.1), many cases taking sides in the circuit split involved 2255 motions rather than direct appeals. See *United States* v. *Saikaly*, 207 F.3d 363, 366 (6th Cir. 2000); *United States* v. *Rudolph*, 190 F.3d 720, 721 (6th Cir. 1999); *United States* v. *Moore*, 83 F.3d 1231, 1233 (10th Cir. 1996). See also *United States* v. *Campbell*, 168 F.3d 263, 264 (6th Cir. 1999) (government motion under Fed. R. Crim. P. 32.1(b)).

Second, there is no reason to distinguish the scope of the *remedy* of resentencing based on the different procedural bars that precede consideration of the merits of a 2255 motion. Obviously, if a resentencing is ordered, the section 2255 movant has overcome any bars to collateral review of his sentence. It would make no more sense to say that a resentencing in a 2255 appeal is more limited than a resentencing on direct appeal than to say that a new trial granted in a 2255 appeal is more limited than a new trial granted on direct appeal. In either case, the court of appeals has determined that further proceedings in the district court are necessary. It is thus not surprising that the government does not cite a single case addressing the question presented in which a court even suggested that the issue was affected by whether the resentencing was the product of a direct appeal or 2255 appeal.[4]

4. Almost in passing, the government suggests (at 11 & n.5) that Congress's recent amendment of 18 U.S.C. § 3742 might affect the appropriateness of certiorari here. That suggestion has no merit; the amendment resolves the circuit split with regard to departures only (and even then, only as to a sub-category of departures). See 18 U.S.C. § 3742(g)(2) (as

---

[4] To the contrary, those decisions that do address this point expressly state that the same rule applies to direct appeals and appeals involving 2255 motions. See *Saikaly*, 207 F.3d at 370 ("The same concerns apply at resentencing whether it occurs following direct appeal or a § 2255 motion."); *Rudolph*, 190 F.3d at 727 (collecting cases).

amended). Petitioner's departure claims are not at issue in this case,[5] as the Second Circuit rejected them on the merits as well as procedurally. The amendment does not, and cannot conceivably be expected to, provide any guidance as to whether offense-level-calculation claims such as those presented by petitioner are to be reviewed de novo after a remand.[6]

5. The government also states that this Court has previously declined to review the question presented and that "there is no reason for a different result here." U.S. Br. 7. That is wrong for two reasons.

First, in the nearly three years since the last denial of certiorari cited by the government, the confusion among the circuits has significantly deepened. Most importantly, as explained in the petition (at 2), the Second Circuit's decision in petitioner's case transformed a two-sided split into a three-

---

[5] Indeed, departures were at issue in only a small minority of the cases that the parties have cited on the question presented.

[6] The government also adverts (at 11-12 n.5), without offering any legal reasoning or explanation of their relevance, to subsection 3742(g)'s statements that the resentencing should proceed pursuant to the factors enumerated in 18 U.S.C. § 3553 and in accordance with the remanding court's instructions. Those provisions do not in any way affect the certworthiness of the petition. *All* federal sentencings proceed pursuant to the factors enumerated in Section 3553, see 18 U.S.C. § 3551(a), and the directive that resentencings should comply with the remanding court's instructions is neither material nor new. See 18 U.S.C. § 3742(f)(1) (requiring, both before and after amendment, that "the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate"); 28 U.S.C. § 2106 (not affected by recent amendments to 18 U.S.C. § 3742) ("The Supreme Court or any other court of appellate jurisdiction . . . may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances.").

sided split. Further, recent cases reflect the worsening uncertainty over the application of the limited remand rule. For example, in *United States* v. *McCoy*, 313 F.3d 561 (D.C. Cir. 2002) (en banc), the D.C. Circuit divided sharply on how the limited remand rule (announced in *United States* v. *Whren*, 111 F.3d 956 (D.C. Cir. 1997)) should be applied and whether the scope of a remand after resentencing is controlled by Fed. R. Crim. P. 32.

Second, the denied petitions cited by the government did not present suitable vehicles for this Court's review. *United States* v. *Hass*, 199 F.3d 749 (5th Cir. 1999), *cert. denied*, 531 U.S. 812 (2000), and *United States* v. *Harris*, 159 F.3d 1357 (5th Cir. 1998) (table), *cert. denied*, 525 U.S. 1148 (1999), involved (as the government noted in its opposition briefs in those cases) remand orders that the district court and court of appeals construed to be *expressly* limited, and thus did not squarely implicate the substance of the split. See Br. in Opp. 7 in *Hass*, No. 99-1694; Br. in Opp. 6 in *Harris*, No. 98-6358. *United States* v. *Marmolejo*, 139 F.3d 528 (5th Cir. 1998), *cert. denied*, 525 U.S. 1056 (1998), announced the limited remand rule for the Fifth Circuit but, as the government pointed out in opposition in that case, would have served as a poor vehicle in this Court because the issues that the defendant sought to raise on resentencing were issues that the court of appeals had considered or decided in the initial appeal. See Br. in Opp. 8 in *Marmolejo*, No. 98-5372. Thus, whether under limited or de novo resentencing, the district court would have been bound by the holding of the court of appeals. *Id.* Finally, *United States* v. *Whren*, 111 F.3d 956 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1119 (1998), involved a remand order that could have been construed as limited; one member of the panel on appeal expressly argued that it was limited. See *Whren*, 111 F.3d at 961 n.* (Henderson, J., concurring); Br. in Opp. 8 in *Whren*, 97-6220.

In petitioner's case, however, the Second Circuit made clear that its remand order had been a general remand, see

App. 10a ("Th[e] remand order neither explicitly stated that the sole issue on remand was whether 'double counting' affected Donato's sentence on the conspiracy count, nor indicated that we intended a *de novo* resentencing"). This case thus provides an ideal vehicle for resolving the question presented.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted.

WILLIAM H. J. HUBBARD
Mayer, Brown, Rowe & Maw
190 S. LaSalle St.
Chicago, IL 60603
(312) 782-0600

ANDREW H. SCHAPIRO
Counsel of Record
Mayer, Brown, Rowe & Maw
1675 Broadway
New York, NY 10019
(212) 506-2500

MAY 2003